# Sinnakaruppi a/p Periakaruppan v Bathumalai a/l Krishnan

HIGH COURT (MUAR) — ORIGINATING SUMMONS NO 24–515 OF 2000
JEFFREY TAN J
9 MARCH 2001

***Family Law*** *— Children — Guardianship — Illegitimate children — Application for custody and care of — Whether should be by way of wardship proceedings — Jurisdiction of court to grant custody and guardianship of legitimate and illegitmate children independently of Guardianship of Infants Act 1961 — Whether Guardianship of Infants Act 1961 applicable to illegitimate children — Courts of Judicature Act 1964 s 24*

The plaintiff, who was the natural mother of her illegitimate infant child, sought a declaration that she was the lawful guardian, and therefore entitled to the custody and care, of her child. A preliminary objection was raised as to the jurisdiction of the court to entertain this application under the Guardianship of Infants Act 1961 ('the GIA'). Counsel for the defendant suggested that the plaintiff should have proceeded by way of wardship proceedings as judicial precedent has shown that the court has no jurisdiction to entertain an application by the natural mother for the custody of her illegitimate children.

**Held**, overruling the objection:

(1) There is no unanimity of views as to whether the GIA is applicable to illegitimate children and that the mother seeking custody of her illegitimate children should do so by way of wardship proceedings. Still, the preponderant view is that the court has jurisdiction under s 24 of the Courts of Judicature Act 1964 ('the CJA') to grant custody and guardianship of both legitimate or illegitimate infants, regardless of the GIA. It does not appear therefore, that the plaintiff must proceed by way of wardship proceedings. Indeed, in the light of the latest amendments to the GIA — the Guardianship of Infants (Amendment) Act 1999 and the substitution of the former s 5 by an altogether new s 5 providing for equality of parental rights — there is less reason to doubt that the GIA in its present form does not apply to illegitimate children (see p 34A–C).

(2) In any event, s 24 of the CJA confers jurisdiction on the court to appoint and control guardians of infants and generally over the person and property of infants, a jurisdiction that is not only restricted to cases within the GIA. A wardship proceeding is to protect a minor. Also in wardship proceedings, a guardian may be appointed. The current proceeding would achieve the same objects. It would not serve any purpose to uphold the present objection (see p 34D–E).

**[Bahasa Malaysia summary**

Plaintif, ibu kandung anak tak sah taraf beliau, telah memohon satu deklarasi bahawa beliau adalah penjaga yang sah, dan oleh itu berhak kepada penjagaan dan pemeliharaan anak beliau. Satu bantahan awal telah ditimbulkan tentang bidang kuasa mahkamah untuk melayan permohonan ini di bawah Akta Penjagaan Kanak-Kanak 1961 ('APK'). Peguam bagi pihak defendan menghujahkan bahawa plaintif sepatutnya bermula melalui prosiding penjaga (wardship proceedings) kerana duluan kehakiman telah menunjukkan bahawa mahkamah tidak mempunyai bidang kuasa untuk melayan satu permohonan oleh ibu kandung untuk penjagaan anak tak sah taraf beliau.

**Diputuskan**, menolak bantahan tersebut:

(1) Tiada kesepakatan pendapat tentang sama ada APK tersebut terpakai ke atas anak tak sah taraf dan bahawa ibu yang memohon penjagaan anak tak sah taraf beliau sepatutnya berbuat demikian melalui prosiding penjaga. Begitupun, pendapat utama adalah bahawa mahkamah mempunyai bidang kuasa di bawah s 23 Akta Mahkamah Kehakiman 1964 ('AMK') untuk memberi penjagaan dan jagaan kedua-dua anak sah dan tak sah taraf, di luar pemakaian APK tersebut. Ia tidak menunjukkan oleh itu, bahawa plaintif harus bermula melalui prosiding penjaga. Sememangnya, dengan mengambilkira pindaan-pindaan terkini kepada APK — Akta Penjagaan Kanak-Kanak (Pindaan) 1999 dan dengan penggantian s 5 dahulu oleh s 5 yang baru yang memperuntukkan hak ibu bapa yang saksama — maka tidak terdapat sebab untuk meragukan bahawa APK dalam bentuknya sekarang tidak terpakai ke atas anak tak sah taraf tersebut (lihat ms 34A–C).

(2) Dalam apa keadaanpun, s 24 AMK memberikan bidang kuasa kepada mahkamah untuk melantik dan mengawal penjaga kanak-kanak tersebut dan secara keseluruhan ke atas diri dan harta kanak-kanak tersebut, satu bidang kuasa yang bukan sahaja terhad kepada kes-kes yang jatuh di bawah APK. Prosiding penjaga adalah untuk melindungi budak di bawah umur. Di dalam prosiding penjaga juga, seorang penjaga boleh dilantik. Prosiding sekarang ini akan mencapai matlamat yang sama. Tidak terdapat apa-apa tujuan sekiranya mengekalkan bantahan yang sedia ada ini (lihat ms 34D–E).]

**Notes**

For cases on guardianship of children, see 7 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2675–2688.

**Cases referred to**

*Balasingam & Paravathy, Infants Kannanmah v Palani* [1970] 2 MLJ 75 (refd)
*CT (an infant), Re* [1957] Ch 48 (refd)
*Khor Liang Keow v Tee Ming Kook* [1996] 2 CLJ 631 (refd)
*Low Pak Houng v Tan Kok Keong* [1998] 2 MLJ 322 (refd)
*Low Pek Nai v Koh Chye Guan* [1995] 1 ML.J 238 (refd)
*Miskin Rowter, Re* [1963] MLJ 34 (refd)
*T v O* [1993] 1 MLJ 168 (refd)
*Tam Ley Chian v Seah Heng Lye* [1993] 3 MLJ 696 (refd)

**Legislation referred to**

Civil Law Act 1956 s 27
Courts of Judicature Act 1964 s 24
Guardianship of Infants Act 1886 and 1925 [Eng]
Guardianship of Infants Act 1961 ss l (2)(a), 10
Guardianship of Infants (Amendment) Act 1999
Law Reform (Marriage and Divorce) 1976
Married Women and Children (Maintenance) Act 1950

*Chong Yeaw Kiong* (*M Jayasingam & Co*) for the plaintiff.
*RR Mahendran* (*RR Mahendran & Co*) for the defendant.

**Jeffrey Tan J.** : In this application by the natural mother ('the plaintiff') for a declaration that she was the lawful guardian and entitled therefore to the custody and care of her illegitimate infant child ('the child'), a preliminary objection was raised as to the jurisdiction of the court to entertain this application under the Guardianship of Infants Act 1961 ('the GIA').

According to Mr RR Mahendran for the defendant ('the natural father'), the plaintiff should have proceeded by way of wardship proceedings. Learned counsel cited the case of *Balasingam & Paravathy, Infants Kannanmah v Palani* [1970] 2 MLJ 75 where Raja Azlan Shah J (as HRH then was) held that the court had no jurisdiction to entertain an application by the natural mother for the custody of her illegitimate children. There the court reasoned: (i) that s 27 of the Civil Law Act 1956 ('the CLA') provides 'In all cases relating to the custody and control of infants, the law to be administered shall be the same as would have been administered in like cases in England as the date of the coming into force of this Ordinance, regard being had to the religion and customs of the parties concerned, unless other provisions is or shall be made by any other written law'; (ii) that the law as administered in England as at the date of coming into force of the CLA was the Guardianship of Infants Act 1886 and 1925; (iii) that *Re CT (an infant)* [1957] Ch 48 decided that English courts have no jurisdiction to make an order granting custody of illegitimate children to the putative father, and, that the terms 'father' and 'mother' do not extend from the *de jure* to the putative; (iv) that therefore, under the law of England in 1956, neither the putative father nor or *de facto* mother can make an

application to court for an order for custody; (v) that the law as administered in England as at the date of coming into force of the CLA has not been modified by local legislation or case law; (vi) that other than s 1(2)(a), the GIA makes no reference to illegitimate children and so does not apply to illegitimate children. The court in *Balasingam & Paravathy* also held that *Re Miskin Rowter* [1963] MLJ 341 is no authority that the GIA applies or not to illegitimate children, and that the remedy was to institute wardship proceedings.

*Balasingam & Paravathy* was cited in at least three reported decisions, the first of which was *T v O* [1993] 1 MLJ 168, where the mother applied for an order that she be given custody of and be appointed guardian of her illegitimate infant child, under s 10 of the GIA, and where a preliminary objection was raised as to the jurisdiction of the court to entertain the application at all, because the infant was illegitimate. Mahadev Shankar J (as he then was) approached that objection from the standpoint of the common law of England and the customary law of Malaysian Chinese, the Married Women and Children (Maintenance) Act 1950, and the Law Reform (Marriage and Divorce) 1976. At p 175, his Lordship said:

> It must be self-evident by now that *Re CT* is a decision which cannot be applied, across the board, to the Malaysian situation. The question of legitimacy can be a complex one. Of course in a case where illegitimacy is clear, and there never was any question of a marriage either de facto or de jure, I would respectfully agree with the court in *Re Balasingam and Paravathy*, but only to the extent that the natural mother of an illegitimate child is the person in whom the parental rights and duties will vest exclusively, in the absence of a court order.

In other words, Mahadev Shankar J said he agreed with the court in *Balasingam and Paravathy* that the natural mother of an illegitimate child is the person in whom the parental rights and duties will vest exclusively. But the court in *Balasingam and Paravathy* did not say, with respect, that the natural mother of an illegitimate child is the person in whom the parental rights and duties will vest exclusively. If the qualification is therefore to be ignored, it means that *T v O* did not agree with *Balasingam and Paravathy* that *Re CT* is applicable. Incidentally, the preliminary objection was overruled.

*Balasingam & Paravathy* was not cited to the court in *Tam Ley Chian v Seah Heng Lye* [1993] 3 MLJ 696. Anyway, in that case, Selventhiranathan JC (as he then was) plainly said that 's 24 of the CJA confers the High Court with jurisdiction to appoint and control guardians of infants which must include illegitimate infants.

*Balasingam & Paravathy* was next considered in *Low Pek Nai v Koh Chye Guan* [1995] 1 MLJ 238, where the natural mother applied under the GIA for custody of her illegitimate infant children. Although served, the defendant did not attend at the hearing. There was no objection to the jurisdiction of the court to grant custody under the GIA. But Mohd Hishamudin J said that he differed with the view in *Balasingam & Paravathy* that the GIA does not apply to illegitimate children.

Pointing to s 1(3), his Lordship held that the GIA refers to illegitimate children, and that the GIA must apply to children generally, legitimate or illegitimate.

However, that was not the view of the court in *Low Pak Houng v Tan Kok Keong* [1998] 2 MLJ 322. Having set out the background to the GIA, Abdul Aziz J held, at p 327:

> … s 1(3) does not prove that parliament intended to change the law from what it had been under the 1935 Ordinance [Guardianship of Infants Ordinance of the Straits Settlements]. Certainly it does not prove that under s 5 of the 1961 Act the father of an illegitimate child should be the guardian of the child. For that, express words are necessary.
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> Neither ought the omission of the word 'lawful' from s 6 to be construed as denoting that parliament intended to effect a change in the law from what it had been under the 1935 Ordinance. As I said, the happy circumstance of the word 'lawful' in s 6 of the Ordinance Is an indication that s 5 also intended to refer to the father of a legitimate child. The omission of the word 'lawful' from s 6 in the 1961 Act ought not to be construed as denoting a change of intention. It is not safe to so construe. For such a radical change in the law, there must be express words to give effect to it.
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> I am therefore of the view that s 5 of the 1961 Act is intended to apply to a lawful father and that accordingly the father of an illegitimate cannot claim guardianship under it.

Quite clearly, Abdul Aziz J disagreed with the view that the whole of the GIA applies illegitimate children. However, his Lordship refrained from stating that the GIA as a whole does not apply to illegitimate children. That, his Lordship made it absolutely clear at p 327:

> I do not, however, need to come to a determination of my own as to whether the 1961 Act does not apply to illegitimate children ... If s 6 does not apply to illegitimate children, so that the mother in this case cannot claim guardianship of the child, then the question must he decided according to the common law of England.

But pertinent to the instant preliminary objection, his Lordship further said, at p 329:

> I would respectfully differ with that decision (*Balasingam & Paravathy*). Section 24(d) of the Courts of Judicature Act 1964 gives the High Court jurisdiction to appoint and control guardians of infants a the person and property of infants. It does not seem to me right that the jurisdiction should be restricted to cases that fall within the 1961 Act.

Meantime, Zulkefly JC (as he then was) had held, in *Khor Liang Keow v Tee Ming Kook* [1996] 2 CLJ 631, 'adalah jelas Parlimen tidak berhasrat Akta Penjagaan Kanak-Kanak 1961 tersebut terpakai kepada anak tak sah taraf dengan tiada rujuk secara langsung terhadapnya dalam Akta tersebut … s 24(d) Akta Mahkamah Kehakiman 1964 yang memberi Mahkamah Tinggi bidang kuasa untuk melantik penjaga (guardian) bagi kanak-kanak (infants) yang pada pandangan saya adalah termasuk kanak-kanak tak sah taraf'.

Evidently, there is no unanimity of views.

Only one case said that the GIA is applicable to illegitimate children. And only one case said that the mother seeking custody of her illegitimate children should do so by way of wardship proceedings. Still, the preponderant view is that the court has jurisdiction under s 24 of the CJA to grant custody and guardianship of both legitimate or illegitimate infants, regardless of the GIA. It does not appear therefore, that the present plaintiff must proceed by way of wardship proceedings. Indeed, in the light of the latest amendments to the GIA (see Guardianship of Infants (Amendment) Act 1999, effective 1 October 1999), and the substitution of the former s 5 by an altogether new s 5 providing for equality of parental rights, there is less reason to doubt that the GIA in present form does not apply to illegitimate children. Presently, the position in England is that 'the statutory provisions relating to orders for custody of, and rights of access to, a minor on the application of a mother or father apply in relation to as minor who is illegitimate as they apply in relation to a minor who is legitimate …' (*Halsbury's Law of England* 4th Ed para 548). Perhaps it would require further study, but *Low Pek Nai v Koh Chye Guan* might have fortuitously and correctly stated the law. In any event, s 24 of the CJA confers jurisdiction on the court to appoint and control guardians of infants and generally over the person and property of infants, a jurisdiction that is not only restricted to cases within the GIA. A wardship proceeding is to protect a minor. Also in wardship proceedings, a guardian may be appointed. This proceeding, call it what you will, would achieve the same objects. It would not serve any purpose to uphold the present objection.

Objection overruled. Parties ordered to proceed with the application proper.

*Objection overruled.*

Reported by Wong Ee Lynn